

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:TL-N-4177-00

MBalachandran

date:

to: SBSE, Group 4, Territory 2, Manhattan Compliance
Attn: Revenue Agent Carl Perrera

from: Area Counsel (LMSB:FSH)

subject: Supplement to September 20, 2000 memorandum

Form SS-10 (Tax Years [REDACTED], [REDACTED] and [REDACTED])
Consent to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL Nos. 6501.08-00

6501.08-10

6501.08-17

EIN Nos. [REDACTED]

DISCLOSURE STATEMENT

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Background

Please refer to our September 20, 2000 memorandum for the facts and discussion in this case. The remainder of this memorandum supplements that September 20 memorandum.

Supplemental Discussion

Subsequent to our September 20, 2000 initial memorandum on this matter, we asked your office to follow up on that memorandum and confirm with the taxpayer whether [REDACTED] merged into [REDACTED] or whether [REDACTED] merged into [REDACTED]. If your inquiry of the taxpayer is not conclusive, you should also check with the Secretary of State's office to determine when the Articles of Merger were filed and under what names.

Our September 20 memorandum provides language to use if you determine that [REDACTED] merged into [REDACTED]. Alternatively, if you determine that [REDACTED] merged into [REDACTED], you should use the following language on the Form SS-10:

"[REDACTED] (EIN [REDACTED]), formerly known as [REDACTED] (EIN [REDACTED]) as successor in interest by way of merger to [REDACTED] (EIN [REDACTED])."

The EIN of [REDACTED] (EIN [REDACTED]) should be entered in the upper right hand corner of the Form SS-10.

Notification to taxpayer

Please note that Section 3461 of the IRS Restructuring and Reform Act of 1998, codified in Section 6501(c)(4)(B), requires the IRS to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitation period. To satisfy this requirement, you may provide Pub. 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form SS-10. Alternatively, you may advise the taxpayer orally or in some other written form of the IRC Section 6501 requirement (such as Letter 907).

Regardless of which method you use to notify the taxpayer, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.

ROLAND BARRAL
Area Counsel (LMSB:FSH)

By: _____
PETER J. LABELLE
Associate Area Counsel

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-4177-00

MBalachandran

date:

to: Chief, Examination Division, Manhattan
Attn: Revenue Agent Carl Perrera, Group 1352

from: District Counsel, Manhattan (CC:NER:MAN)

subject:

Form SS-10 (Tax Years [REDACTED], [REDACTED] and [REDACTED])
Consent to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL Nos. 6501.08-00
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INTRODUCTION

This memorandum is in response to your request for advice in the above-captioned matter. Specifically, you have asked our office to review a Form SS-10 (Consent to Extend the Time to Assess Employment Taxes) executed on behalf of [REDACTED], for the taxable years [REDACTED] and [REDACTED]. You have also asked us to advise on the correct name to use for an

extension for the [REDACTED] year. The proposed Form SS-10 would extend the statute of limitations on assessment through [REDACTED].

ISSUES

1. Which entity is the proper entity to execute a Form SS-10 for [REDACTED] for the pre-merger tax years?
2. What specific language should be used on the Form SS-10 for [REDACTED] for the pre-merger tax years?

FACTS

Merger

From the documents you have supplied it is not clear whether [REDACTED] merged into [REDACTED] (" [REDACTED] ") or into [REDACTED].

On the one hand, the Form 1120 information supplied by the taxpayer pursuant to regulation section 1.368-3 states that on [REDACTED] [REDACTED]. (EIN [REDACTED]) transferred all of its assets (except a Managing General Agent's license) subject to its liabilities to [REDACTED] (EIN [REDACTED]). Immediately thereafter [REDACTED] changed its name to [REDACTED]. At the time of the reorganization, all the shares of [REDACTED] and [REDACTED] were owned by [REDACTED] (EIN [REDACTED]).

On the other hand, the "Joint Unanimous Written Consent of Board of Directors and Sole Shareholder" of [REDACTED], signed on [REDACTED], states that consent is given to the merger of [REDACTED] into [REDACTED].

You have informed us that when questioned about the above, the taxpayer's representative informed Revenue Agent Perrera that the written consent of the shareholders and the board was sought after the merger was effected and was pro forma since there was one shareholder who was common to both corporations. Thus, it appears that [REDACTED] merged into [REDACTED] on [REDACTED] but that by the time the merger was approved, as described below, [REDACTED] had changed its name to [REDACTED].

Name Changes

Subsequent to the merger, the corporation underwent two name changes:

1) On [REDACTED], [REDACTED] filed with the Secretary of State of Texas an Article of Amendment to the Articles of Incorporation of [REDACTED], changing its name to [REDACTED].

2) On [REDACTED], [REDACTED] filed with the Secretary of State of Texas an Article of Amendment to the Articles of Incorporation changing its name to [REDACTED].

DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

1. Which entity is the proper entity to execute a Form SS-10 on behalf of [REDACTED] for the pre-merger tax years?

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). However, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. I.R.C. 6501(c)(4). For employment taxes, the form used by the Service to extend the limitations period on assessment is Form SS-10 (Consent to Extend the Time to Assess Employment Taxes).

Unlike the income tax liability of a consolidated group, where, as a general rule, the common parent acts as sole agent for each member of the group, each member of a consolidated group must act on its own behalf with respect its own employment tax

liabilities. See I.R.C. § 1501 and the regulations thereunder. Each member is, therefore, responsible for entering into its own consent to extend the statute of limitations with respect to its employment tax liabilities. In the case of a merged corporation, the surviving or resulting corporation in a merger under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 499; See also Popular Library Inc. v. Commissioner, 39 T.C. 1092 (1963); Union Bleachery v. Commissioner, 97 F.2d 226 (4th Cir. 1938).

Merger

It is our understanding that both [REDACTED] and [REDACTED] were corporations formed under Texas law. Thus, they are governed by Texas law. The Texas Business Corporation Act states the following with regard to the "Effect of Merger or Share Exchange"

A. When a merger takes effect:

(3) all liabilities and obligations of each domestic or foreign corporation and other entity that is a party to the merger shall be allocated to one or more of the surviving or new domestic or foreign corporations and other entities in the manner set forth in the plan of merger, and each surviving or new domestic or foreign corporation, and each surviving or new other entity to which a and other entity that is a party to the merger shall be allocated to one or more of the surviving or new domestic or foreign corporations and other entities in the manner set forth in the plan of merger, and each surviving or new domestic or foreign corporation, and each surviving or new other entity to which a liability or obligation shall have been allocated pursuant to the plan of merger, shall be the primary obligor therefor and, except as otherwise set forth in the plan of merger or as otherwise provided by law or contract, no other party to the merger, other than a surviving domestic or foreign corporation or other entity liable thereon at the time of the merger and no other new domestic or foreign corporation or other entity created thereby, shall be liable therefor. Tex. Bus. Corp. Act art. 5.06.

We have not been provided with any reason to doubt that the merger was properly effected. Under the terms of the merger, [REDACTED] (later known as [REDACTED]) assumed all the liabilities and performance obligations of [REDACTED] See,

Board resolution and adoption of that resolution by the shareholder of [REDACTED]. Thus, subsequent to the merger, the appropriate party to sign the SS-10 would have been [REDACTED].

Name Change

The Articles of Amendment resulting in the two name changes were apparently completed pursuant to appropriate Texas law. See, Tex. Bus. Corp. Act art. 4.04. The amendment to the Articles of Incorporation do not state that they affect any provision other than the name. Therefore the obligations relating to [REDACTED] flow through to [REDACTED], onto [REDACTED] and finally onto [REDACTED].

Officer to execute the SS-10

The Form SS-10 should be executed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of [REDACTED]. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

2. What specific language should be used on the Form SS-10 for [REDACTED], for the pre-merger tax years?

The name of the entity on the SS-10 extending the Statute of Limitations to Assess Employment Tax for the pre-merger tax liability of [REDACTED] should read as follows:

"[REDACTED]. (EIN [REDACTED]) formerly known as [REDACTED] (EIN [REDACTED]) formerly known as [REDACTED]. (EIN [REDACTED]) as successor by way of merger to [REDACTED] (EIN [REDACTED])."

The EIN of [REDACTED], [REDACTED], should be entered in the upper right corner of the SS-10.

LINDA R. DETTERY
District Counsel

By: _____
PETER J. LABELLE
Assistant District Counsel

Noted:

LINDA R. DETTERY
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